The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PAMELA S. OWEN, Plaintiff, v. FEDERAL HOUSING FINANCE AGENCY; FEDERAL HOME LOAN MORTGAGE CORPORATION; MTC FINANCIAL, INC. d/b/a TRUSTEE CORPS; BISHOP MARSHALL & WEIBEL, P.S.; and CHUCK E. ATKINS, in his official capacity as Clark County Sheriff, Defendants.	Case No. 3:15-cv-05375-BHS DEFENDANT MTC FINANCIAL INC.'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) NOTE ON MOTION CALENDAR: July 17, 2015

I. INTRODUCTION AND RELIEF REQUESTED

Defendant MTC Financial Inc., d/b/a Trustee Corps ("MTC"), by and through its counsel of record Michael S. DeLeo of Peterson Russell Kelly PLLC, hereby moves this Court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the claims brought against MTC by Plaintiff Pamela S. Owen ("Ms. Owen"). Ms. Owen's CPA claim against MTC is facially inadequate and factually unsupported, and should be dismissed. Likewise, her claim against MTC under 42 U.S.C. § 1983, however, is fatally flawed as a matter of law, and should be also be dismissed.

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

II. FACTUAL AND PROCEDURAL BACKGROUND

On or about November 4, 2005, Ms. Owen executed a fixed rate note (the "Note") in favor of Landmark Mortgage in exchange for a $208,250.00 loan.[1] The Note was secured by a Deed of Trust against residential property in Clark County, Washington ("the Property").[2] The Deed of Trust was recorded in Clark County on November 15, 2005.[3] The Deed of Trust named Fidelity National Title as trustee, Landmark Mortgage Company as lender, and Mortgage Electronic Registration Systems ("MERS") as beneficiary and nominee of the lender.[4] The Deed of Trust further provided that the Note, together with the Deed of Trust, could be sold one or more times without notice to the borrowers.[5]

On or about April 22, 2014, Bank of America, N.A., the then-current beneficiary of the Deed of Trust, sent Ms. Owen a written Notice of Default.[6] MTC, which Bank of America had appointed successor trustee under the Deed of Trust, subsequently sent Ms. Owen a Notice of Trustee's Sale.[7] MTC held the trustee's sale on January 16, 2015, at which sale the Property was purchased by Defendant Federal Home Loan Mortgage Corporation ("Freddie Mac").[8] The trustee's sale satisfied in full the obligation secured by the Deed of Trust.[9]

Freddie Mac eventually initiated a wrongful detainer action against Ms. Owen.[10] MTC is not a party to that action.[11] At some point, Freddie Mac sought and obtained a writ of restitution, directing the Sheriff of Clark County to deliver possession of the Property to Freddie Mac.[12] The

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[1] The Note, or part thereof, is attached to Ms. Owen's Complaint as Exhibit 5.
[2] The Deed of Trust is attached to Ms. Owen's Complaint as Exhibit 4.
[3] Complaint at Exhibit 4.
[4] Complaint at Exhibit 4, pp. 1-2.
[5] Complaint at Exhibit 4, p. 13 (¶ 20).
[6] The Notice of Default is not itself attached to Ms. Owen's Complaint, but is referenced at p. 2, Section VI of the Notice of Trustee's Sale attached to her Complaint as Exhibit 3.
[7] Complaint at Exhibit 3. *See also* Complaint at Exhibit 8 (MTC's Appointment as Successor Trustee).
[8] Complaint at Exhibit 2.
[9] *Id.*
[10] Complaint at ¶ 1.2 (alleging that the unlawful detainer action was first filed on April 2, 2015). *See also* Complaint, at Exhibits 12 and 13 (summons and complaint in the unlawful detainer action, showing signature date of March 3, 2015). The dispute between Freddie Mac and Ms. Owen as to when the unlawful detainer action was commenced is not material to this Motion.
[11] Complaint, at Exhibit 13.
[12] Complaint, at Exhibit 18 (writ of restitution dated April 3, 2015).

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

Clark County Sheriff posted the writ on the Property on May 5, 2015.[13] However, it is unclear from Ms. Owen's Complaint whether she is still in possession of the Property.

Ms. Owen filed her Complaint in this matter in Clark County Superior Court on May 7, 2015. Defendants Federal Housing Finance Authority ("FHFA") and Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively, the federal defendants) removed the matter to this Court on June 5, 2015.

Ms. Owen's pleading is not always a model of clarity. However, she at most alleges two claims against MTC: 1) a claim under the Washington State Consumer Protection Act ("CPA"), to the effect that MTC somehow violated that statute by acting as the trustee in the non-judicial foreclosure of her home; and 2) a claim under 42 U.S.C. § 1983 to the effect that MTC, by conducting an allegedly unlawful nonjudicial foreclosure, acted under color of state law and violated her civil rights. As demonstrated below, each of these allegations fails to state a claim upon which relief can be granted.

III. ARGUMENT AND AUTHORITY

1. The standard governing motions under Rule 12(b)(6).

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.[14] A complaint must allege facts to state a claim for relief that is plausible on its face.[15] A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[16] Although the Court must accept as true a complaint's well-pled facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion.[17] "[A]

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[13] Complaint, at ¶ 1.19.
[14] *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990).
[15] *See Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).
[16] *Id.*
[17] *See, e.g., Vasquez v. L.A. County,* 487 F.3d 1246, 1249 (9th Cir.2007). *See also Tritz v. U.S. Postal Serv.*, 721 F.3d 1133, 1140 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2692, 189 L. Ed. 2d 213 (2014) (noting that "[i]n determining whether plaintiffs can prove facts in support of their claim that would entitle them to relief, we may consider facts contained in documents attached to the complaint").

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level."[18] This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[19]

2. Ms. Owen's CPA claim against MTC is inadequately pled, and should be dismissed.

Ms. Owen devotes more than fifty paragraphs of her twenty-five page Complaint to her CPA claim.[20] MTC is mentioned only five times in those paragraphs.[21] Clearly, Ms. Owen focused her CPA claim on Defendant Freddie Mac, and added MTC as an afterthought.[22] In so far as the CPA claim was intended to be directed against MTC as well as against Freddie Mac, it is facially deficient: it doesn't even make a "formulaic recitation of the elements of a cause of action" against MTC.[23] In particular, it makes no allegations at all regarding how MTC's actions supposedly satisfy the second through fifth elements of the *Hangman Ridge* test for a CPA violation.[24] Accordingly, this claim must be dismissed as to MTC.

Also, although Ms. Owen may conceivably be able to amend her Complaint to state a colorable CPA claim against MTC, her current threadbare factual allegations about MTC would not form part of any such claim. The gist of Ms. Owen's current CPA allegation against MTC is

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[18] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations and footnote omitted).

[19] *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*).

[20] Complaint, at pp. 12-22, ¶¶ 5.1 to 5.40. A total of fifty two paragraphs are involved, because Ms. Owen uses sub-paragraphs 5.15.1 through 5.15.12.

[21] Complaint, at ¶¶ 5.10, 5.15.1, 5.15.3, 5.15.6, and 5.23.

[22] Ms. Owen accompanies her CPA claim with five subheadings, each of which exclusively focuses on Freddie Mac: "A. The Acts of Defendant Freddie Mac are Unfair and Deceptive," at Complaint, p. 12; "B. Defendant Freddie Mac Acts in Trade or Commerce" and "C. Defendant Freddie Mac's Acts Impact the Public Interest," at Complaint, p. 19; "D. Defendant Freddie Mac's Acts Injure Consumers," at Complaint, p. 20; and "E. Defendant Freddie Mac's Business Practices Cause Consumer Injury," at Complaint, p. 21.

[23] *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555.

[24] *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 780, 719 P.2d 531, 533 (1986) (holding "that to prevail in a private CPA action . . . a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation").

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

that "MTC Financial fraudulently issued to Defendant Freddie Mac a Trustee's Deed upon sale . . . which misrepresented the language from Defendant Freddie Mac's Form . . . to reflect the fact that Landmark Mortgage Company, and not MERS, Inc., was the 'Beneficiary of the security instrument." Ms. Owen, as the party subject to nonjudicial foreclosure, arguably has no standing to object to the terms of the Trustee's Deed issued after the foreclosure to a different party (here, Freddie Mac). She certainly can show no injury from any of the wording of that deed. More importantly, the recorded Deed of Trust, attached to Ms. Owen's Complaint as Exhibit 4, clearly shows Landmark Mortgage listed as a "grantee" of the Deed of Trust, along with MERS.[25] The recorded Deed of Trust goes on to state that Landmark Mortgage is the "Lender," and that "the beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns)."[26] Thus, there was no mistake—let alone any fraud—committed by MTC when it recited in the Trustee's Deed issued to Freddie Mac that the Landmark Mortgage Company was the beneficiary of the original Deed of Trust.[27]

For all of these reasons, Ms. Owen's CPA claim against MTC fails to state a claim upon which relief can be granted, and must be dismissed.

3. Ms. Owen's claim against MTC under 42 U.S.C. § 1983 fails as a matter of law, and should be dismissed with prejudice.

To state a claim for relief in an action brought under § 1983, Ms. Owen must establish that she was deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law.[28] Ms. Owen has failed to adequately plead either of these elements in her § 1983 claim against MTC, so this claim must be dismissed.

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[25] Complaint at Exhibit 4, p. 1.
[26] Complaint at Exhibit 4, pp. 2-3 (emphasis added).
[27] Compare Complaint at ¶ 5.15.1 and ¶ 5.15.3 with page 1 of Exhibit 2 to the Complaint. The Washington Supreme Court's 2012 decision in *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34, 41 (2012) does nothing to undermine Landmark Mortgage Company's status as original beneficiary by virtue of being the lender and original holder of the note. *Bain* held that MERS could not be a proper beneficiary if it never held the Note; it did not hold that listing MERS as the beneficiary on a deed of trust meant that there was in fact no beneficiary. *See Bain*, 175 Wn. 2d at 111 (noting that "if in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender's successors").
[28] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999).

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Moreover, because the deficiencies in this claim "could not possibly be cured by the allegation of other facts," the dismissal of this claim should be with prejudice.[29]

With regard to the first element of her § 1983 claim, Ms. Owen does not clearly allege the deprivation of any specific constitutional or federal rights. Instead, she simply states as follows:

> Defendant MTC Financial, Inc., d/b/a Trustee Corps., intentionally violated Plaintiff's constitutional right to contract; right to property and right to be safe and secure in her home when conducting an unlawful nonjudicial foreclosure sale on January 16, 2015.[30]

Read charitably, these assertions of alleged constitutional rights "to contract," "to property," and "to be safe and secure in her home" could perhaps be treated as references, respectively, to Article I, Section 10 of the Constitution[31], the Fourteenth Amendment[32], and the Fourth Amendment.[33] Even assuming these additional details, Ms. Owen cannot show that she was deprived of any rights conferred by any of these provisions.

First, by its plain terms, Article I, Section 10 of the Constitution does not create any abstract "right to contract." Instead, it prevents states from passing laws that "impair[] the Obligation of Contracts." Ms. Owen does not appear to be alleging that the Washington Legislature violated Article I, Section 10 of the Constitution by passing the Deed of Trust Act (DTA), nor could she plausibly claim that MTC somehow conspired with the Legislature to pass that law. In so far as it is based on an alleged violation of Article I, Section 10—the only possible

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[29] *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir.1990).
[30] Complaint at ¶ 6.5.
[31] Article I, Section 10 of the United States Constitution states as follows: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility" (emphasis added).
[32] Section1 of the Fourteenth Amendment to the United States Constitution states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis added).
[33] The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

source of a constitutional "right to contract"—Ms. Owen's § 1983 claim is completely unfounded, and must be dismissed.

Second, the Fourth Amendment to the Constitution protects individuals from "unreasonable searches and seizures."[34] MTC submits that it has plainly not "searched" Ms. Owen's property in the common sense meaning of the term (and Ms. Owen does not allege that it has).[35] Ms. Owen may believe that MTC has somehow "seized" her property, but even if MTC "conduct[ed] an unlawful nonjudicial foreclosure sale"—and it of course denies that the foreclosure sale was unlawful—it never acquired "physical control" of her home.[36] Indeed, as far as one can tell from Ms. Owen's Complaint, she has remained in "physical control" and possession of her home to this date.

Moreover, the Fourth Amendment only creates rights against the government. "The Fourth Amendment['s] . . . protection applies to governmental action." [37] In this regard, a claim under the Fourth Amendment is identical to a claim under the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment states, in relevant part, that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." This language, and the jurisprudence developed under both Amendments, establishes "an essential dichotomy between government action, which is subject to scrutiny ... and private conduct, which however discriminatory or wrongful," is not subject to the same constitutional protections.[38]

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[34] *See, e.g. Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048 (1921) (noting that "[t]he Fourth Amendment['s] . . . protection applies to governmental action"); *and*

[35] *See, e.g., Kyllo v. United States*, 533 U.S. 27, 50, 121 S. Ct. 2038, 2051, 150 L. Ed. 2d 94 (2001) (noting that "[w]hen the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief'") (citing to N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed.1989)).

[36] *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628 (1989) (stating that "violation of the Fourth Amendment requires an intentional acquisition of physical control").

[37] *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048 (1921) (emphasis added). *See also Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 2041, 150 L. Ed. 2d 94 (2001) (noting that "[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion") (emphasis added).

[38] *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1446 (10th Cir.1995) (comparing the jurisprudence of the Fourth and Fourteenth Amendments).

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE **(425) 462-4700** FAX **(425) 451-0714**

Ms. Owen cannot show that MTC's actions in conducting the foreclosure sale were essentially state actions, and she accordingly fails to establish the first element of her § 1983 claim: deprivation of a right secured by the Constitution or laws of the United States. Both the United States Supreme Court and the Ninth Circuit have acknowledged that there is no state action "when a creditor enforce[s] a lien through purely private, non-judicial sale . . . even though the lien was authorized by the state's legislative enactment."[39] As the Ninth Circuit held in *Apao,*

What is required for state action in this area is "overt official involvement" in the enforcement of creditors' remedies. Thus, in *Flagg Bros.*, where there was a "total absence of overt official involvement," 436 U.S. at 157, 98 S.Ct. 1729, there was no state action. There is none here. While the bar for state action is low . . . non-judicial foreclosure procedures like Hawaii's nevertheless slip under it for want of direct state involvement.[40]

The statute governing non-judicial foreclosures in Hawaii at the time of the *Apao* decision, Haw. Rev. Stat. § 667-5, was for all relevant purposes essentially identical to the current Washington Deed of Trust Act, and in particular, RCW 61.24.030.[41] It follows from *Apao* that even if MTC had "conduct[ed] an unlawful nonjudicial foreclosure sale on January 16, 2015," this would not support the first element of a § 1983 claim based on violations of the Fourth or Fourteenth Amendments, because MTC's acts—even if wrongful—did not entail any "state action."[42]

Ms. Owen may to distinguish *Apao* on the basis that here, the Sheriff of Clark County eventually served her with a writ of restitution.[43] But even if the Sheriff's involvement could support the first element of a § 1983 claim against some or all of MTC's co-defendants, it does not support such a claim as directed against MTC. At least as to MTC, Ms. Owen's cursory allegation

[39] *Apao v. Bank of New York*, 324 F.3d 1091, 1094 (9th Cir. 2003) (citing to *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed2d 185 (1978)). *See also Charmicor, Inc. v. Deaner*, 572 F.2d 694, 696 (9th Cir.1978) (finding no state action where plaintiffs challenged Nevada's non-judicial foreclosure statute on due process grounds).
[40] *Apao*, 324 F.3d at 1095 (emphasis added).
[41] *Id.* at 1093 (quoting extensively from Haw. Rev. Stat. § 667-5).
[42] Complaint, at ¶ 6.5.
[43] Complaint, at ¶¶ 1.19-1.25; 6.11-6.14.

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

of a "conspiracy" involving the Sheriff is facially inadequate.[44] "To show a conspiracy between private and state actors for § 1983 purposes, there must be an agreement or meeting of the minds to violate a person's constitutional rights."[45] No such "meeting of the minds" between MTC and the Clark County Sheriff is or could be alleged here, where MTC's participation in the matter ended on or about January 19, 2015, when it issued its Trustee's Deed to Defendant Freddie Mac.[46] It was Defendant Freddie Mac that started an unlawful detainer action some months later, and it was Defendant Freddie Mac that sought a writ of restitution.[47] Ms. Owen does not and could not plausibly allege that MTC had any control over Freddie Mac's actions, let alone those of the Sheriff.[48] Accordingly, Ms. Owen's § 1983 claim against MTC fails as a matter of law to establish the required first element.

For similar reasons, Ms. Owen's § 1983 claim against MTC fails because she cannot establish the second element: that MTC acted under color of state law. Although § 1983's under-color-of-state-law requirement is technically separate from the Fourteenth Amendment's state-action requirement, "the two inquiries are closely related."[49] When a plaintiff is "required to establish state action for purposes of their constitutional claims, [the courts] treat the under-color-of-state-law requirement and the state-action requirement as equivalent." [50] Here, Ms. Owen has to—but cannot—establish state action for her claims under the Fourth and Fourteenth

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[44] Complaint, at ¶ 6.9 (alleging that "MTC Financial's wrongful foreclosure . . . was pursuant to a conspiracy with Defendant's Federal Housing Finance Agency and Federal Home Loan Mortgage Corporation to manipulate Washington's Deed of Trust Act").
[45] *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1114 (C.D. Cal. 2006) *aff'd sub nom. Bernhard v. City of Ontario*, 270 F. App'x 518 (9th Cir. 2008).
[46] Complaint, at ¶ 5.15.1.
[47] Complaint, at ¶ 1.2; ¶ 1.19
[48] *See Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1357 (9th Cir.1981) (noting that to be considered to be in joint activity with the state, the private actor needs to have some control over the state actors' decision making).
[49] *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997)
[50] *Id. See also Collins v. Womancare*, 878 F.2d 1145, 1147-48 (9th Cir. 1989) (elaborating on relationship between the "state action" and "under color of state law" requirements); *and Yan Sui v. Marshack*, No. SACV 13-1607 JAK AJW, 2015 WL 1637424, at *6 (C.D. Cal. Feb. 4, 2015) report and recommendation adopted, No. SACV 13-1607 JAK AJW, 2015 WL 1649037 (C.D. Cal. Apr. 10, 2015).

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

Amendments. Accordingly, her § 1983 claim against MTC also fails because she cannot establish that MTC acted under color of state law.[51]

Ms. Owen's § 1983 claim against MTC is fatally flawed. She does not and cannot allege facts that would show that MTC deprived her of a federal statutory or constitutional right, and that MTC acted under color of state law. Accordingly, her § 1983 claim against MTC should be dismissed with prejudice.

IV. CONCLUSION

For all of the reasons stated above, this Court should grant MTC's motion to dismiss Ms. Owen's claims against MTC for failure to state a claim upon which relief can be granted.

DATED: June 18, 2015.

PETERSON RUSSELL KELLY, PLLC

By: /s/ Michael S. DeLeo
Michael S. DeLeo, WSBA # 22037
Attorneys for Defendant MTC Financial Inc., d/b/a Trustee Corps

[51] *See Sepehry-Fard v. Bank of New York Mellon, N.A.*, 588 Fed. Appx. 685 (9th Cir. 2014) (affirming 12(b)(6) dismissal of § 1983 action alleging constitutional violations related to mortgage loans, for the reason that plaintiff "failed to allege facts sufficient to show that defendants acted under color of state law").

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE (425) 462-4700 FAX (425) 451-0714

CERTIFICATE OF SERVICE

I certify that I caused to be served in the manner noted below a copy of the foregoing pleading on the following individual(s):

Steven J. Dixson 422 W Riverside Ave, Ste 1100 Spokane, WA 99201 E-Mail: aliciaa@witherspoonkelley.com, sjd@witherspoonkelley.com	[ ] Via Facsimile [ ] Via First Class Mail [ ] Via Messenger [ ] Via Email [X] Via CM/ECF Electronic Notice
Barbara L. Bollero Bishop White Marshall & Weibel PS 720 Olive Way, Ste 1201 Seattle, WA 98101 E-Mail: tburt@bwmlegal.com, atodakonzie@bwmlegal.com, bbollero@bwmlegal.com	[ ] Via Facsimile [ ] Via First Class Mail [ ] Via Messenger [ ] Via Email [X] Via CM/ECF Electronic Notice
Jody M. McCormick Witherspoon, Kelley, Davenport & Toole 1100 US Bank Bldg 422 W Riverside Ave, Ste 1100 Spokane, WA 99201 E-Mail: erinh@witherspoonkelley.com, jmm@witherspoonkelley.com	[ ] Via Facsimile [ ] Via First Class Mail [ ] Via Messenger [ ] Via Email [X] Via CM/ECF Electronic Notice
William P. Richardson Clark County Prosecution -Civil Division 1300 Franklin St Vancouver, WA 98660 E-Mail: thelma.kremer@clark.wa.gov, bill.richardson@clark.wa.gov	[ ] Via Facsimile [ ] Via First Class Mail [ ] Via Messenger [ ] Via Email [X] Via CM/ECF Electronic Notice
Pamela S. Owen 3912 NE 57th Avenue Vancouver WA 98661	[ ] Via Facsimile [X] Via First Class Mail [ ] Via Messenger [ ] Via Email [ ] Via CM/ECF Electronic Notice

DATED: June 18, 2015, at Bellevue, Washington.

_/s/ Rachel White_____________
Rachel White, Paralegal

PETERSON RUSSELL KELLY PLLC
1850 Skyline Tower – 10900 NE Fourth Street
Bellevue, Washington 98004-8341
TELEPHONE **(425) 462-4700** FAX **(425) 451-0714**